

**IN THE STATE OF MICHIGAN
MICHIGAN SUPREME COURT**

**IN RE:
PETITION TO ESTABLISH
STATEWIDE INACTIVE ASBESTOS
DOCKETING SYSTEM**

CASE #2003-47

**MEMORANDUM OF American Lung Association of
Michigan, Michigan Protection and Advocacy Service,
Inc. and Michigan Citizen Action , IN OPPOSITION TO
PETITION TO
ESTABLISH A STATEWIDE INACTIVE ASBESTOS
DOCKETING SYSTEM**

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(American Lung Association of Michigan, Michigan Protection and Advocacy Service, Inc. and Michigan Citizen Action) through their undersigned representative offer the following Memorandum In Opposition to the Petition To Establish a Statewide Inactive Asbestos Docketing System.

Introduction

A group of defendants in asbestos litigation, apparently representing a small minority of the total defendants in asbestos litigation in the State of Michigan, have petitioned this Honorable Court to establish an "inactive" asbestos docket for certain asbestos litigants. The Petitioners are necessarily vague regarding their proposal and the specific ways in which the requested relief would or should be implemented. Regardless of the paucity of detail concerning the proposed inactive docket, Petitioners have chosen a constitutionally flawed path in their attempt to effectuate change in the long-standing, common law of the State of Michigan. For this reason, Respondents (American Lung Association, Michigan Protection and Advocacy Service, Inc

and Michigan Citizen Action) offer this Memorandum in Opposition to said Petition.

Background

The perspective of Respondents herein is unique when compared to the other entities which have commented on the Petition. Respondents are not parties to the litigation nor do Respondents have a financial stake tied directly to the outcome of this Petition.

Rather, Respondents' interest in the instant Petition can be accurately characterized as procedural in nature. At this point and in this forum, Respondents take no position as to when an individual suffering from non-malignant asbestos disease is "impaired" or whether a diagnosis of asbestosis standing alone should serve to trigger or toll an individual's cause of action. Moreover, Respondents have no independent means to determine the accuracy of the facts relied upon by the Petitioners in support of their Petition concerning the number of asbestos cases presently pending in the State of Michigan, the type of disease suffered by the Plaintiffs in those cases or the financial ability of the Defendants to deal with this litigation. ¹

Respondents are cognizant, however, that Michigan citizens diagnosed with asbestosis have a valid cause of action under Michigan common and statutory law and, further, that the litigation of such causes of action in nearly

¹ Respondents have been made aware that asbestos personal injury litigation in Michigan involves over 250 defendants. According to the Petition itself, a small minority of those defendants support this Petition.

every case results in an amicable resolution (settlement) of the dispute. Moreover, based on Respondents' review of the Petition as well as the papers supporting and opposing to the Petition and the various comments posted on the Michigan Supreme Court's website, the "facts" which form the core of the Petition are not of record and essentially are the unsubstantiated allegations of counsel for parties to the litigation.

The Michigan Supreme Court is nonetheless now considering adopting a "Court Rule" which would change the common law of Michigan and likely disenfranchise citizens of the State of Michigan who have been or will be diagnosed with non-cancerous asbestos disease. It is this very troubling procedural posture which causes these Respondents to address this Honorable Court.

Argument

The Michigan Supreme Court has held that non-malignant asbestos disease, specifically, asbestosis, is: "[A]n injury caused by exposure to asbestos," which gives rise to a cause of action. Larsen v Johns-Manville Sales Corporation, 427 Mich. 301, 315, 399 N.W. 2d 1, 18 (1986). The Larsen Court made it clear that the very diagnosis of the disease asbestosis, without reference to pulmonary function test results, or anything else for that matter, gives rise to a cognizable cause of action under Michigan Law against the tortfeasors responsible for causing such a disease. Larsen, supra.

As Petitioners accurately note in their supporting Brief, this Honorable Supreme Court may issue rules regarding the practice, procedure and conduct of matters within the Michigan Court system, as long as those rules do not modify substantive law. (see Brief of Petitioner, page 21, citing McDougall v Shanz, 461 Mich. 15, 29, 597 N.W. 2d 148 (1999)).

The Michigan Supreme Court is being asked by Petitioners to abrogate the substantive common law of the State of Michigan. First, Petitioners would have this Honorable Court eliminate the substantive rights of present and future litigants with asbestosis under the guise of amending a court rule.

Petitioners at the same time necessarily urge this Court to ignore its own precedent, and the mandate of the Constitution of the State of Michigan, establishing that this Honorable Court, despite its broad powers, is not to modify the substantive law. McDougal, *supra*; Mich. Const. art III, § 2.

Petitioners' base their argument on an alleged "crisis" in the Michigan Court system. Respondents dispute the very existence of such a "crisis". According to materials appended to Petitioners' Brief, the jurisdictions where the litigants have voluntarily adopted such an inactive docket system have tens of thousands of asbestos-related cases pending (over 35,000 cases in Cuyahoga County, Ohio, over 20,000 cases in New York City, in excess of 10,000 cases in Baltimore, many thousands of cases in Cook County, Illinois). It appears that there is only a fraction of that number of cases pending in the entire State of Michigan. Wayne County, the county with the largest share of asbestos cases

in the State of Michigan, had 1,500 cases pending at the end of 2002 and there may be 4,000 cases pending in the entire State of Michigan.

But Respondents do not presume to argue whether there is or is not a "crisis" in the Michigan Court system as a result of asbestos. Rather, there is an absolute absence of any factual record concerning the existence of such a crisis. Nor does any record exist concerning the cause of such a crisis. There has been no evidence adduced or tested by the parties on these fundamental preliminary issues. Further, the procedures presently utilized by this Honorable Court to entertain amendments to Court Rules do not allow for the gathering and testing of evidence.

Thus, Respondents respectfully suggest that neither this Court, nor any court, is the appropriate forum for resolution of the instant Petition. Rather, the Legislature, with its processes and procedures for gathering and testing evidence and allowing affected and interested parties meaningful input and participation, is the appropriate forum. The Legislature, not the judiciary, has the duty and power to make or change the laws, to grant, broaden or restrict substantive rights. The basis of this separation of powers, as noted by James Madison in the Federalist No. 47, is the rationale that "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." (emphasis in original).

Conclusion

Petitioners have asked this Court to legislate by adopting, without an evidentiary basis or meaningful due process, a “court rule” which would effectively deny thousands of citizens of Michigan their fundamental right of access to the courts to litigate a cognizable common law cause of action. Can this, or any cause of action arising from the common law be eliminated? Surely. The Legislature has the authority, and the processes and procedures to ensure fairness, to modify the common law by tempering or eliminating a cause of action.

Petitioners, however, have chosen an inappropriate vehicle to attempt to forge fundamental change in Michigan’s common law by asking this Court to ignore the Michigan Constitution, ignore its own precedent as set forth in McDougal and to effectively legislate. Respondents, (American Lung Association of Michigan, Michigan Protection and Advocacy Service, Inc and Michigan Citizen Action) therefore respectfully urge this Court to take no action on the Petition to Establish an Inactive Asbestos Docket and to allow the parties seeking this radical change in Michigan’s common law to do so in a Constitutionally sound way-by petitioning the Legislature.

Respectfully Submitted

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